No. 80-722

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

VS.

SUPERIOR COURT OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST and CHRISTINA PAIGE BUIST,
Real Parties in Interest.

BRIEF FOR REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

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QUESTION PRESENTED

In the view of the Real Parties in Interest, the only question presented by Petitioner in seeking certiorari is whether the Due Process Clause of the Fourteenth Amendment permits a California court to assert *in personam* jurisdiction over a Canadian defendant doing business in California in an action involving the wrongful death of a California man whose patronage had been solicited and contracted by defendant in California.

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN COURT BELOW

On May 5, 1980, the Superior Court of the State of California in and for the County of Alameda denied the motion of defendant Canadian Mountain Holidays, Ltd., to quash service of process in case number 529343-4, *Wendy Paige Buist, individually and as Guardian ad Litem of Christina Page Buist, a minor, v. Canadian Mountain Holidays, Ltd.; Raymond Ware, et al.* Pursuant

to request of defendant's counsel, the Superior Court orally stated its findings as follows (Record (R) Transcript at 13):

> Well, I found that the Canadian Mountain Holidays had sufficient contacts and activities in the state of California and with the decedent as to warrant a response in these courts.

On June 24, 1980, the Court of Appeal of the State of California in and for the First Appellate District denied the petition of Canadian Mountain Holidays, Ltd., for issuance of a writ of mandate to the Superior Court. On July 30, 1980, the Supreme Court of the State of California, sitting *en banc*, denied the petition of Canadian Mountain Holidays, Ltd., for hearing on the matter. In each instance, a summary order was issued without detailed written opinion.

STATEMENT OF CASE

The Real Parties in Interest in this case are the young widow and infant daughter of the late Ian Buist, a California man who died while skiing on a tour arranged, conducted and supervised by Petitioner, Canadian Mountain Holidays, Ltd. (hereinafter referred to as CMH). Mr. Buist was on a mailing list of CMH, which sent copies of its promotional and solicitation materials to Mr. Buist's home in Oakland, Alameda County, California, as well as to the homes and offices of numerous other California people and businesses. (R. Affidavit of Hans Gmoser, President of CMH at 5-7). CMH advertises in California and presents promotional shows and films in that State. (*Id.* at 7-8).

On or about November 3, 1978, Mr. Buist entered into a contract with CMH in California by accepting CMH's offer to perform certain services for him and by issuing to CMH a signed check drawn on a California bank for the full amount of money demanded by CMH. (R. Plaintiff's Exhibits 1 and 2). As part of the services which it contracted to perform, CMH took Mr. Buist on a ski trip on January 26, 1979, in the Canadian Rocky Mountains. The CMH employee-guide who was supervising Mr. Buist's trip skiied away from Mr. Buist who, left to ski alone, fell into a hole in the snow from which he could not extricate himself. By the time CMH found Mr. Buist, he had suffocated to death.

One month after his death, Mr. Buist's daughter, Christina, was born. On or about January 22, 1980, Mrs. Buist filed a wrongful death action on behalf of herself and her child against CMH in the Superior Court of California in and for the County of Alameda. Since then, CMH has sought to relieve itself of the burden of having to answer that suit.

SUMMARY OF ARGUMENT

Petitioner does business in the State of California, but contends that it does not in an effort to avoid jurisdiction in that State. It presents the fact situation to this Court as involving nothing more than "the unilateral activity of a California resident . . . contacting a Canadian business to reserve recreational services at a Canadian location." (Petition at 7). This is not the fact situation presented in the evidence, nor that described by Petitioner's own president (R. Affidavit of Hans Gmoser), nor is

it the fact situation found by the trial court. Thus, by its petition, Petitioner is asking the Supreme Court of the United States to reweigh the facts of the case. It does this under the guise of asking for a definitive ruling as to what constitutes a sufficient minimum contact to support jurisdiction in an interstate business context (Petition at 11-12); even though this Court has consistently explained that such rigid rules are not applicable to the involved concepts of due process, reasonableness and fairness. *Kulko v. Superior Court,* 436 U.S. 84, 98 S.Ct. 1090 (1978); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945).

The appropriate standard for determining a State's jurisdiction over a non-resident defendant acting in a commercial situation is whether that defendant's commercial conduct with respect to a forum state is such that he should reasonably be rendered liable to suit in that State's courts. *Kulko v. Superior Court, supra,* 436 U.S. at 96; and *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295, 100 S.Ct. 559, 567 (1980). Under this standard, the finding of the Superior Court of Alameda County, California that Petitioner's contacts with and activities in California were sufficient to warrant jurisdiction was just and proper.

ARGUMENT

I. Petitioner Is Not Entitled To The Relief Afforded By A Writ Of Certiorari

As Rule 17 of the Rules of the Supreme Court states, a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. No such rea-

sons have been evidenced in the instant petition. The merits of Petitioner's position have already been found wanting by three courts, including the Supreme Court of California. In seeking this Court's review, Petitioner does not challenge the law of the State of California, nor does it allege that it has been treated differently than other parties under the broadly written standards of jurisdiction applicable in California.[1] Instead, Petitioner challenges the factual findings of the Superior Court of Alameda County, alleging that other courts ruling on other factual situations at other times and in other places have concluded differently with respect to the existence of jurisdiction. It thus asks the Supreme Court "to state clearly what does and does not constitute a sufficient minimum contact to support jurisdiction in an interstate business context." (Petition at 11-12).

The fact is, however, that this Court has just recently addressed this very issue in *Kulko v. Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1090, 1097 (1978), wherein it specifically declined to establish any such mechanical rule:

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson v. Denckla*, 357 U.S. 235, 246, 78 S.Ct. 1228, 1235, 2 L.Ed.2d 1283

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[1]Section 410.10 of the California Code of Civil Procedure provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or the United States.

> (1958). We recognize that this determination is one in which few answers will be written "in black and white. The grays are dominant and even among them the shades are innumerable." *Estin v. Estin*, 334 U.S. 541, 545, 68 S.Ct. 1213, 1216, 92 L.Ed. 1561 (1948).

The concept for which Petitioner seeks a hard and fast rule is no more susceptible of further definition than is the Constitutional standard of due process, and it is specious to seek certiorari on that ground. See *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945).

II. Petitioner Was Not Denied Due Process

A. The Applicable Standard

Due process requires that the defendant be subject to the personal jurisdiction of the court. *International Shoe Co. v. Washington, supra,* 326 U.S. 310, 66 S.Ct. 154. A state court may exercise jurisdiction over a nonresident defendant if there exist minimum contacts between the defendant and the forum State. *International Shoe Co. v. Washington, supra,* 326 U.S. at 316, 66 S.Ct. at 158. In order to meet the "minimum" requirement, a defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington, supra,* 326 U.S. at 316, 66 S.Ct. at 158. Among the factors to be considered in determining the reasonableness of the defendant's relationship to the forum are the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the judicial system's interest in obtaining the most efficient resolution of controversies. *World-Wide*

Volkswagen Corporation v. Woodson, 444 U.S. 286, 292, 100 S.Ct. 559, 564 (1980).

The Petitioner's efforts to compel this Court to issue a rigidly restrictive rule on jurisdiction fly in the face of the legal developments which have naturally and necessarily evolved over the years. See *Hanson v. Denckla,* 357 U.S. 235, 250-251, 78 S.Ct. 1228 (1958). As the Court pointed out in *McGee v. International Life Insurance Co.,* 355 U.S. 220, 222-223, 78 S.Ct. 199, 201 (1957), the march of progress has brought changes in commerce, transportation and communications such that it has become much less burdensome for a party sued to defend itself in a state where it engages in economic activity. In 1980, the Court noted in *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 292-293, 100 S.Ct. at 565, that the historical developments referenced in *McGee* have only accelerated in the twenty-three years since that decision was written.

Thus, in *World-Wide Volkswagen* it was established that the question to be asked in the due process analysis is whether "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297, 100 S.Ct. at 567. The Court resolved that question in *World-Wide Volkswagen* by declaring (444 U.S. at 297-298, 100 S.Ct. at 567):

> Hence, if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in

> other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. Compare *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1960).

Application of that test to the instant case clearly supports the findings of the Superior Court.

B. Jurisdiction Was Properly Found In Accordance With The Standards Applied In World-Wide Volkswagen And Kulko v. Superior Court

The sale of Petitioner's services to Californians, and to the deceased in particular, arose from Petitioner's deliberate and concerted efforts to exploit the California market and serve the California consumer. Petitioner is a commercial venture seeking to operate for a profit by selling the relatively exclusive and unique service of helicopter skiing in the Canadian Rocky Mountains.

California is, of course, not only the most populous state in Petitioner's neighboring United States, but it has nearly as many people as in all of Petitioner's native Canada. CMH admits to advertising in California.[2] It admits to

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[2]Although CMH implies in its Petition (at 9) that it advertises only in "national magazines of general circulation," the fact is that it places full-color, full page advertisements in PSA Magazine, the in-flight publication of PSA airlines, which only flies to and from points in California.

supplying California with promotional materials and mailings, and it admits to sending commercial representatives into the state. (R. Affidavit of Hans Gmoser at 5-8). Clearly, CMH expected that its product (i.e., its helicopter skiing trips) would be purchased by consumers in California. Equally clear is the fact that CMH's sale of the fatal trip to Mr. Buist was not an isolated occurrence, since it was CMH's practice "automatically" to place all customers on its mailing list in order to continue soliciting their business. (*Id.* at 8). Accordingly, inasmuch as CMH was seeking to develop additional business in California, it should have reasonably anticipated that its activities were going to make it subject to the jurisdiction of California courts. See *World-Wide Volkswagen v. Woodson, supra,* 444 U.S. at 297, 100 S.Ct. at 567.

The activities engaged in by CMH were and are continuous, systematic, and ongoing. Pursuant thereto, CMH purposely availed itself of the privilege of conducting business within California by, *inter alia,* utilizing a California company to distribute its promotional materials (R. Affidavit of Hans Gmoser at 8) and engaging in commercial transactions with California travel agents (*Id.* at 6-7). See *Buckeye Boiler v. Superior Court,* 71 Cal.2d 893, 902 (1969); and compare *Kulko v. Superior Court, supra,* 436 U.S. at 100-101, 98 S.Ct. at 1701, which found California had no jurisdiction in a child support case over a father "who derives no personal or *commercial* benefit from his child's presence in California and who lacks any other relevant contact with the state". (Emphasis added).

In its petition to this Court, CMH attempts to skirt the clear distinction enunciated in *Kulko v. Superior Court* between personal relations and commercial transactions. Rather than "[leaving] open the issue," as CMH would have it (Petition at 11), the Court in *Kulko* was careful to establish that its reasons for refusing to affirm California's jurisdiction over a non-resident father would not pertain to a non-resident such as CMH which seeks commercial benefits from solicitation of business from California residents. In denying California's jurisdiction in that one instance of family law, the Court said (436 U.S. at 96, 98 S.Ct. at 1699):

> There is no claim that appellant has visited physical injury on either property or persons within the State of California. Cf. *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927). The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal domestic relations. *It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court*; appellant's activities cannot fairly be analogized to an insurer's sending an insurance contract and premium notices in the state to an insured resident of the state. Cf. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957). (Emphasis added).

CMH cannot deny it purposefully derived benefits from activities relating to the State of California. After all, on Mr. Buist's fatal trip nearly two-thirds of the skiers were from California. (R. Plaintiff's Exhibit 4). Further, CMH

cannot deny that the death in question caused an effect in California. A California child is left to grow up without a father, and her mother is unable to seek employment outside the house because she cannot leave the infant alone. Compare *Kulko v. Superior Court, supra,* 436 U.S. at 100, 98 S.Ct. at 1701. Obviously, California has a recognized interest in the litigation and in having it heard in its own forum. *Neiman v. Rudolf Wolff & Co., Ltd.,* 619 F.2d 1189 (7th Cir. 1980); and see *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 91 S.Ct. 1005 (1971). Moreover, because CMH has chosen to seek out and do business with people throughout this country, the United States, too, has a noteworthy interest deserving of protection. See *Cryomedics, Inc. v. Spembly, Ltd.,* 397 F.Supp. 287, 290-292 (D.Conn. 1975). Unless jurisdiction is established over and in relation to the activities conducted by CMH in this country, that company may be left free to hide behind the border and lure Americans into a potential free-fire zone in which they unwittingly travel without protection.

Petitioner CMH has knowingly selected California as a market source in which it wishes to do business. It must be prepared to accept the liabilities as well as the benefits of that market. As Mr. Justice Marshall said in his dissent in *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 317, 100 S.Ct. at 570:

> Commercial activity is more likely to cause effects in a larger sphere, and the actor derives an economic benefit from the activity that makes it fair to require him to answer for his conduct where its effects are felt. The profits may be used to pay the costs of suit, and knowing that the activity is likely to have effects

> in other states the defendant can readily insure against the costs of those effects, thereby sparing himself much of the inconvenience of defending in a distant forum.

This view was essentially shared by the majority of the Court in *World-Wide Volkswagen* when it declared (444 U.S. at 297, 100 S.Ct. at 567):

> When a corporation "purposely avails itself of the privilege of conducting activities within the forum State," *Hansen v. Denckla, supra,* at 253, 2 L.Ed. 2d 1283, 78 S.Ct. 1228, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Moreover, CMH cannot claim ignorance of the likelihood that it was subjecting itself to jurisdiction by doing business in this country in light of the fact that this is not the first time it has been forced to defend itself in United States courts. (See, e.g., *Heinrich K. Aigner v. Bell Helicopter, Inc., Canadian Mountain Holidays, Ltd., et al.,* No. 79 C 3910, N.D. Ill. E.D., decided May 9, 1980). Thus, we submit, California jurisdiction was a risk eminently foreseeable and, apparently, acceptable to CMH when it elected to seek business in California. Petitioner cannot claim that it has been deprived of due process because one of its California transactions resulted in suit in that State.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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